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In The

Supreme Court of the United States

October Term, 1986

FRANK J. SZOPKO,

Petitioner,

-vs-

KINSMAN MARINE TRANSIT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDIX –

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A SEAMAN IS "IN THE COURSE OF HIS EMPLOYMENT" AS THAT PHRASE IS USED IN THE JONES ACT, 46 USC § 688, SO AS TO BE ENTITLED TO THE APPLICATION OF THE ACT TO INJURIES SUSTAINED BY SLIPPING ON THE VESSEL'S CARGO ON THE DOCK ADJACENT TO THE SHIP WHILE RETURNING FROM AUTHORIZED SHORE LEAVE.

II.

WHETHER A SHIPOWNER'S DUTY UNDER THE JONES ACT TO PROVIDE A SAFE PLACE TO WORK IS LIMITED TO THE IMMEDIATE VICINITY OF THE GANGWAY SUCH THAT NEGLIGENCE RESULTING IN DOCKSIDE INJURIES THIRTY FEET FROM THE SHIP IS BEYOND THE REACH OF THE ACT.

PARTIES TO PROCEEDINGS

Petitioner FRANK SZOPKO ("Szopko") is a seaman. On September 1, 1973, the date he was injured, Szopko was employed aboard the Buckeye Monitor, a Great Lakes vessel operated by Respondent Kinsman Marine Transit Company ("Kinsman Marine" or "the shipowner").

In 1974, Petitioner Szopko filed suit against Respondent in Wayne County Circuit Court, a trial court of general jurisdiction in Detroit, Michigan. That suit, predicated on the Jones Act, 46 USC § 688, alleges that the injuries sustained by Szopko were caused by the shipowner's negligence.

After the jury returned a verdict for Szopko, Kinsman Marine appealed to the Michigan Court of Appeals. That court affirmed. The shipowner then appealed to the Supreme Court of Michigan, which overturned the judgment. It is that ruling which Petitioner seeks to have reviewed.

To summarize, Szopko, the injured seaman, was the plaintiff in the state trial court and appellee in the Michigan appellate courts. He is the Petitioner in this Court. Kinsman Marine, the shipowner, was the defendant at trial and the appellant on appeal. It is the Respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

OPINIONS BELOW

On June 27, 1984, the Michigan Court of Appeals issued its *per curiam* opinion affirming the jury verdict for Petitioner. That opinion (A-1 – A-10) is unpublished.

The order of the Supreme Court of Michigan granting leave to appeal is reported as *Szopko* v *Kinsman Marine Transit Company*, 422 Mich 933 (1985). The Supreme Court's opinion reversing the verdict for Petitioner (B-1 – B-24) is reported as *Szopko* v *Kinsman Marine Transit Co*, 426 Mich 653; 397 NW2d 171 (1986). That Court's order denying Petitioner's Motion for Rehearing is found at 426 Mich 633 (1987) (C-1).

SUPREME COURT JURISDICTION

Petitioner seeks review of the construction of the Jones Act, 46 USC § 688, imposed by the Supreme Court of

Michigan as a result of its opinion and its order of February 3, 1987 (C-1). That order denied Petitioner's timely Motion for Rehearing. He invokes the certiorari jurisdiction conferred on this Court by 28 USC § 1257(3).

STATUTE INVOLVED

46 USC § 688 (The Jones Act), provides in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . ."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from the construction of the Jones Act, 46 USC § 688, imposed by the Supreme Court of the State of Michigan. In substance, that Court held that when a seaman is injured by his employer's negligence, he has no remedy under the Jones Act where those injuries arise on the pier adjacent to the vessel, owned by another, during the course of the seaman's return from authorized shore leave along the appropriate route. This result was reached even though the pier was in the shadow of the ship, about thirty feet from the vessel itself, even though the pier was the only means of access to the ship from town, even though the injury occurred when Petitioner slipped on the ship's cargo, and even though the shipowner's

negligence consisted of its failure to utilize the ship's lighting to illuminate the pier and the failure of its watchman to perform his designated function of assisting returning seamen in need of aid. The background facts which give rise to this interpretation of the Jones Act are as follows.

On the day in question, Petitioner was employed aboard the Buckeye Monitor, a Great Lakes vessel operated by Respondent. During the sailing season, from April to December, Szopko worked an eight hour shift from 8:00 a.m. to 4:00 p.m., seven days a week, without vacation.

On September 1, 1973, the Buckeye Monitor arrived in Conneaut, Ohio, to unload a cargo of taconite. Taconite is coal pressed with steel, has the shape of a marble or ball bearing, and is black-gray in color. To unload it, the ship pulled into a slip at the dock, and the cargo was unloaded on a conveyor.

Under the ship's policy, the members of the crew were authorized (but not required) to take shore leave. The only apparent restrictions were that the seaman was to complete his ship-side responsibilities before embarking on shore leave and was to return in time for his next watch. Pursuant to this policy, Petitioner left the ship at about 6:30 p.m. and ventured into town. Before he left, the first engineer, Szopko's superior, asked him to get a carton of cigarettes.

There was a single route to the town, which was marked with yellow foot prints painted on the dock. This route required one to cross over the conveyor system 20 to 40 feet from the ship's ladder by scaling three or four steps, walking across the cross-over ramp, and descending the stairs on the other side.

After purchasing the cigarettes for the engineer, Szopko went to a local bar, where he saw two shipmates, Johnson and Adamzak. Just prior to midnight, Szopko returned to the ship. On the way back, he met up with Adamzak and Johnson, who observed his allegedly intoxicated condition but hurried ahead to commence their duty, leaving Petitioner behind.

Petitioner followed the yellow footsteps back toward the vessel. The conveyor was operating, unloading the ship's cargo. The area around the cross-over was strewn with taconite. The lighting around the cross-over area was such that the area was dark. The ship's spotlight, which could have illuminated the area, was not on, and any lights in the area were burnt out.

The watchman noted that as Szopko approached the cross-over area, he was "moving fairly slow and kind of staggering". Although it is a watchman's duty to lend assistance to approaching seamen in need, no assistance was lent Petitioner.

In the area of the cross-over, he lost his footing because of the darkness and taconite spillage and fell, hitting his head. This lawsuit resulted.

The case proceeded to trial,[1] where Petitioner claimed that the shipowner was negligent in failing to provide a safe work environment, failing to use the ship's spotlight to illuminate the cross-over area, and failing to render assistance per the watchman. The jury returned a special verdict expressly finding negligence by Kinsman Marine, 35% comparative negligence by Szopko, and

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[1] An earlier trial also resulted in a verdict for Szopko. That verdict was reversed on appeal on grounds having nothing to do with the questions currently before the Court. *Szopko* v *Kinsman Marine Transit Co*, 96 Mich App 64; 292 NW2d 486 (1980), *lv den*, 411 Mich 902 (1981). As a result of the first appeal, this retrial ensued.

total damages of $380,000. Judgment was entered for Petitioner in the amount of $247,000 (65% of $380,000).

Respondent appealed to the Michigan Court of Appeals, contending that the Jones Act was inapplicable. In an unpublished *per curiam* opinion, the appellate court unanimously affirmed, holding:

> "The term 'course of employment' as used in the statute 'is the equivalent of the "service of the ship" formula used in maintenance and cure cases'. *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129; 80 S Ct 247; 4 L Ed 2d 191 (1959). The United States Supreme Court has long held that a seaman on shore leave is in the service of the ship. *Warren* v *United States*, 340 US 523; 71 S Ct 432; 95 L Ed 503, 509 (1951). A seaman on shore leave is, therefore, in the course of his employment. *Central Gulf Steamship Corp* v *Sambula*, 405 F 2d 291, 298-299 (CA 5, 1968); *Marceau* v *Great Lakes Transit Corp*, 146 F 2d 416, 418-419 (CA 2, 1945).
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> "[T]he decisions cited by defendant . . . make little sense in light of the Supreme Court precedents. If a seaman on shore is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the ship owner's liability for its negligence at the end of the gangplank. Such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of his employment even though off the ship.
>
> * * * Under the Jones Act, an employer has a duty to provide seamen with a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel."

The Michigan Supreme Court granted leave to consider the application of the Jones Act to injuries suffered by a seaman returning to ship on the dock adjacent to the ship. The majority concluded that the Act was inapplicable.

In reaching this result, the Court rejected as *dicta* this Court's statement in *Braen* that "[t]he term 'course of employment' as used in the [Jones Act] is the equivalent of the 'service of the ship' formula used in maintenance and cure cases," and declined to analogize the employer's duty to that arising under the FELA [*Szopko*, 426 Mich at 661, 670]. In the view of the majority, *Braen* required that "the seaman must be 'doing the work of his employer pursuant to his employer's orders' at the time of injury" to be "in the course of employment" while off the vessel [*Szopko*, 426 Mich at 661]. Capsulizing its concept of the application of the Jones Act to cases like this, the Court observed [*Szopko*, 426 Mich at 664]:

> "We hold that, for purposes of a Jones Act claim, a seaman is in the course of his employment if he is doing the work of his employer pursuant to his employer's orders, *Braen*, *supra*, or when the nature of the service rendered and its relation to the operation of the vessel, *O'Donnell*, *supra*, is of such a nature that a seaman may be deemed in the course of his employment. We decline to adopt a more precise rule since this determination should be made case by case."

The Court further concluded that the shipowner had no duty to its returning employee because the shipowner did not exercise "any real control over the dock area" [*Szopko*, 426 Mich at 669]. In this fashion, it held that no duty arose from the proximity of the place of injury to the ship, the necessity of returning seamen crossing the conveyor, the presence of the ship's cargo

causing the fall, the presence of a watchman whose responsibility was to assist, or the ability of the vessel to illuminate the area.

One Justice of the Michigan Supreme Court wrote a separate concurring opinion. In his view, Petitioner was "in the course of his employment" for Jones Act purposes while returning from authorized shore leave [*Szopko*, 426 Mich at 673-676]. Another Justice, relying on this Court's decision in *Braen*, concluded that a seaman is in the course of his employment while returning from shore leave and that the shipowner's Jones Act duty entailed the obligation to provide a safe means of ingress to the vessel [*Szopko*, 426 Mich at 676-677].

After release of the decision of the Michigan Supreme Court, Petitioner filed a timely Motion for Rehearing, asserting that the Jones Act at least applies under these circumstances to injuries occurring in the shadow of the ship. The Motion for Rehearing was denied by order of February 3, 1987 (C-1). Petitioner now seeks this Court's review of the issues of statutory construction presented.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A SEAMAN IS "IN THE COURSE OF HIS EMPLOYMENT" AS THAT PHRASE IS USED IN THE JONES ACT, 46 USC § 688, SO AS TO BE ENTITLED TO THE APPLICATION OF THE ACT TO INJURIES SUSTAINED BY SLIPPING ON THE VESSEL'S CARGO ON THE DOCK ADJACENT TO THE SHIP WHILE RETURNING FROM AUTHORIZED SHORE LEAVE.

The state court's construction of the Jones Act is captured by its holding [*Szopko*, 426 Mich at 664]:

> "We hold that, for purposes of a Jones Act claim, a seaman is in the course of his employment if he is doing the work of his employer pursuant to his employer's orders, *Braen*, *supra*, or when the nature of the service rendered and its relation to the operation of the vessel, *O'Donnell*, *supra*, is of such a nature that a seaman may be deemed in the course of his employment."

The second prong of the construction is no more than a circular tautology, ". . . a seaman is in the course of his employment if . . . a seaman may be deemed in the course of his employment". This gibberish aside, the critical feature of the state court's construction of the Jones Act is its view that only if shore leave is undertaken "pursuant to his employer's orders" is a seaman "in the course of his employment" under the principles of *Braen*. Certiorari should be granted to review this construction of the Act.

A. The State Court Decision Is At Odds With This Court's Decisions In *O'Donnell* v *Great Lakes Dredge & Dock Co*, 318 US 36 (1943); *Aguilar* v *Standard Oil Co Of New Jersey*, 318 US 724 (1943); *Warren* v *United States*, 340 US 523 (1951); And *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129 (1959) Which, Collectively, Establish That A Seaman On Shore Leave Is "In The Service Of The Ship" For Purposes Of Maintenance And Cure And "In The Course Of His Employment" For Purposes Of The Jones Act.

The earliest view of the Jones Act deemed it limited to injuries sustained aboard the ship. Under this view, exemplified by *Todahl* v *Sudden & Christenson*, 5 F2d 462 (9th Cir. 1925), a seaman who was injured during the course of shore leave was not "in the course of his em-

ployment" and was therefore disqualified from the benefit of the Act.

That narrow construction was rejected by this Court in *O'Donnell* v *Great Lakes Dredge & Dock Co*, 318 US 36 (1943), where the Court considered the applicability of the Jones Act to injuries occurring off the vessel. The Court found coverage, noting that, at least since the twelfth century, "the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to the vessel, whether occurring on land or sea" (*O'Donnell*, 318 US at 41-42).

Soon thereafter, the Court considered *Aguilar* v *Standard Oil Co of New Jersey*, 318 US 724 (1943). In *Aguilar*, the issue posed was "whether a ship owner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured traversing the only available route between the moored ship and the public street" (*Aguilar*, 318 US at 725). The *Aguilar* Court held that during authorized shore leave, a seaman remains "in the service of the ship." In reaching this result, the Court explained the inherent nexus between shore leave and a seaman's employment (*Aguilar*, 318 US at 733-734):

> "To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it

> may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary * * * to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.
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> "In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment" (footnote omitted).

In *Warren* v *United States*, 340 US 523 (1951), this Court considered the compensability of injuries sustained during shore leave by a seaman who was injured at a dance hall as a result of conditions of the building. The Court affirmed the liberal meaning afforded the phrase "in the service of the ship" and held that the seaman was entitled to recover. While *Aguilar* and *Warren* are maintenance and cure cases, their analysis of the term "in the service of the ship" applies as well to the "course of employment" element of the Jones Act. In *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129, 132-133 (1959), the Court took pains to explain the equivalence of these two maritime standards:

> "These two cases [*Aguilar* and *Warren*] were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities

> which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases."

In its decisions since *Braen*, this Court has not withdrawn from its position that the phrase "in the course of his employment" in the Jones Act is to be given the same liberal construction as the "in the service of the ship" terminology which extends to shore leave injuries per *Aguilar* and *Warren*. Indeed, more recent decisions in other maritime contexts confirm the breadth of recovery allowed. In the words of *Sea-Land Services, Inc* v *Gaudet*, 414 US 573, 583 (1974) and *American Export Lines, Inc* v *Alvez*, 446 US 274, 281-282 (1982):

> "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

The state court's dismissal of the above-quoted excerpt from *Braen* as *dicta*, and its attempt to draw an outcome-determinative distinction between "ordered" shore leave and "authorized" shore leave, miss the mark. As this Court so plainly observed in *Aguilar*, shore leave inherently fosters the interests of the shipowner. It is, in the Court's words, "an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion." The Court should grant certiorari to review the decision below which is at odds with this Court's decisions.

B. The Court Should Grant Certiorari To Resolve The Conflict Of Authority As To Whether A Seaman Is In The Course Of His Employment While Returning From Authorized Shore Leave.

Article III, § 2, ¶ 1 of the Constitution of the United States recognizes the federal adjudicatory power over "all cases of admiralty and maritime jurisdiction." The Jones Act itself reflects the Congressional intent to create a uniform body of federal maritime law to be uniformly applied throughout the country. These goals are thwarted by conflicting constructions of the Jones Act which accomplish divergent results in comparable cases, all on the basis of divergent local constructions of a federal statute which Congress intended to have consistent application.

The state decision in this case denies Petitioner the protections of the Jones Act on the ground that this shore leave was not "ordered". Apart from the fact that this conclusion ignores the principles addressed in *Aguilar*, it is inconsistent with other decisions which reach the opposite conclusion.

The *Aguilar-Warren-Braen* trilogy established that a seaman remains "in the service of the ship" during shore leave. Since "service of the ship" is the equivalent of "course of employment," other courts and commentators have recognized that this element of Jones Act liability is met when a seaman is injured on authorized shore leave. See Anno: *Jones Act — Course of Employment*, 4 L Ed 2d 191; *Kyriakas* v *Goulandris*, 151 F2d 132 (2nd Cir. 1945); Gilmore & Black, *The Law of Admiralty*, p 284; *Williamson* v *Western-Pacific Dredging Corp*, 304 F Supp 509 (Ore, 1969); *Central Gulf Steamship Corp* v *Sambula*, 405 F2d 291 (5th Cir. 1968).

The cases confirm that a seaman injured during the course of authorized shore leave is "in the service of the

ship" for purposes of maintenance and cure and "in the course of his employment" for purposes of the Jones Act. *Marceau* v *Great Lakes Transit Corp*, 146 F2d 416 (2nd Cir. 1945); *Dasher* v *United States*, 59 F Supp 755 (ED Pa, 1946), *aff'd*, 161 F2d 732 (3rd Cir. 1947); *Walton* v *Continental S.S. Co*, 66 F Supp 836 (Md, 1946); *Central Gulf Steamship Corp* v *Sambula, supra*; *Allan* v *Brown & Root, Inc*, 491 F Supp 398, 401 (Tex, 1080); *Monteiro* v *Paco Tankder, Inc*, 93 F Supp 93, 95 (ED Pa, 1950).

This case is indistinguishable[2] from *Marceau*, where the seaman slipped on the dock while returning from shore leave. The Second Circuit had no difficulty in concluding that the Jones Act applied, noting "Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route."

Of like import is *Central Gulf Steamship Corp* v *Sambula*, 405 F2d 291 (5th Cir. 1968), where a seaman on shore leave was assaulted. The Fifth Circuit found the Jones Act applicable, observing, "a seaman [is] 'in the course of employment', as that phrase is used in the Jones Act, while enjoying his shore leave in a foreign port".

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[2] The state court's attempt to distinguish *Marceau* on the ground that the plaintiff there was acting under "orders" in returning to the ship because he "was ordered to return at a designated time to provide the night lunch," while Petitioner "did not have to return to work until 8:00 a.m. the next morning" [*Szopko*, 426 Mich at 662, 664] is wholly unpersuasive. As a seaman, Petitioner had signed on for the voyage, an undertaking which obligated him not to desert the ship in Ohio. To fulfill this obligation, it was necessary for him to return to the ship. Unlike land-based employees, a seaman's living quarters are at the job site. Not only is he expected to sleep on the vessel, he has no other home when the vessel is moored at a foreign port. The Michigan Court failed to explain why Petitioner was not "in the course of his employment" when he traversed the walkover, intending to sleep in his bunk before commencing the shift, while he would be covered by the Jones Act if he had fallen in the same place at 7:55 a.m. the following morning after staying out all night.

Other cases are comparable in recognizing that a seaman returning to the vessel is "in the course of his employment" for Jones Act purposes. See *Nowery* v *Smith*, 69 F Supp 755 (ED Pa, 1946), *aff'd*, 161 F2d 732 (3rd Cir. 1947); *Hamilton* v *Marine Carriers Corp*, 332 F Supp 223 (ED Pa, 1971); *Magnolia Towing Co* v *Pace*, 378 F2d 12 (5th Cir. 1967); *McDonough* v *Buckeye S. S. Co*, 103 F Supp 473 (ND Ohio, 1951), *aff'd*, 200 F2d 558 (6th Cir. 1952).

Such important issues of admiralty jurisprudence as the meaning of the Jones Act deserve consistent, uniform treatment throughout the country. This Court should grant certiorari to resolve the decisional conflict.

C. Certiorari Should Be Granted, As The State Court Decision Fails To Effectuate The Congressional Intent Underlying The Jones Act.

The ruling below also fails to effectuate the Congressional intent underlying the Jones Act. The erosion of the rights which Congress sought to confer warrants this Court's attention.

The Jones Act is an outgrowth of the Federal Employers Liability Act (FELA), 45 USC § 51 *et seq*. By the enactment of the FELA in 1908, Congress sought to liberalize the benefits available to railroad workers. It is settled that the FELA applies to injuries sustained on adjacent premises owned by another over which employees must travel to attend their work. *Carter* v *Union R Co*, 438 F2d 208 (3rd Cir. 1971); *Kooker* v *Pittsburgh & Lake Erie R Co*, 258 F2d 876 (6th Cir. 1958); *Shenker* v *B&O R Co*, 374 US 1, 7 (1963).

The state court expressly declined to construe the Jones Act as extending comparable protection to seamen [*Szopko*, 426 Mich at 670]. Yet this Court has repeatedly recognized that the Jones Act's incorporation by refer-

ence of "all statutes . . . extending the common-law right or remedy in cases of personal injuries to railroad employees" reflects the Congressional intent to provide seamen with the same protections afforded railroad workers under the FELA. *Garrett* v *Moore-McCormack, Inc*, 317 US 239 (1942); *O'Donnell* v *Great Lakes Dredge & Dock Co*, 318 US 36 (1943).

Moreover, as this Court recognized in *Braen*, when Congress used the phrase "in the course of his employment" in the Jones Act, it sought to draw upon the established body of maintenance and cure cases recognizing the nexus between maritime employment and shore leave. The ruling below ignores the Congressional intent to incorporate the maintenance and cure concept of "service of the ship" into the Jones Act.

Finally, the Jones Act exemplifies the overarching solicitude for seamen which characterizes admiralty law. Ironically, in applying a statute designed to afford relief in cases of doubt, the Supreme Court of Michigan has denied the Congressionally intended benefit.

In the final analysis, Petitioner's injuries occurred in a maritime working environment a few scant feet from the vessel itself. The dock on which the injury occurred was the only means of ingress to the vessel from the town. The objects on which Petitioner fell, the taconite, were the ship's cargo. The cause of the injury was the negligence of the ship's watchman and its failure to utilize its spotlight. The exposure to these perils was directly caused by Petitioner's employment, and the need to traverse the conveyor arose from the requirement that he return to the ship prior to the commencement of his watch the following day.

The conclusion that Petitioner was nonetheless not "in the course of his employment" is one contrary to the

decisions of this Court, at odds with the decisions of many federal courts, and unfaithful to the intent of the Congress which used these words in the Jones Act. Certiorari should be granted.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE CONCLUSION THAT A SHIPOWNER'S DUTY UNDER THE JONES ACT TO PROVIDE A SAFE PLACE TO WORK IS LIMITED TO THE IMMEDIATE VICINITY OF THE GANGWAY SUCH THAT NEGLIGENCE RESULTING IN DOCKSIDE INJURIES THIRTY FEET FROM THE SHIP IS BEYOND THE REACH OF THE ACT.

A theoretically distinct, yet closely related, issue is that of a shipowner's "duty" under the Jones Act. The Michigan courts have never taken issue with the jury's unanimous finding that the shipowner was negligent. The Michigan Supreme Court has held that this negligence is not actionable because Kinsman Marine had no "duty" to refrain from negligently injuring its seaman on the adjacent dock.

The Michigan Court of Appeals recognized that the "duty" issue was inextricably tied to the "course of employment" question. As it observed, "If a seaman on shore leave is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the shipowner's liability for its negligence at the end of the gangplank." The Supreme Court likewise intimated that the two were related: that if the seaman was not "in the course of his employment", the shipowner had no duty to refrain from negligence. Given the substantial overlap between the two questions, the discussion in Issue I applies to this issue as well.

In particular, a split of authority has arisen on the issue of whether the Jones Act duties imposed on a shipowner are limited to the geographic confines of the

employer's premises. For example, in *Hamilton* v *Marine Carriers Corp*, 332 F Supp 223, 232 (ED Pa, 1971), the Court pointedly observed:

> "[A] shipowner has a non-delegable duty to furnish plaintiff with a safe means of ingress and egress from his place of employment and . . . the scope of this duty extends to the dock at which the ship is berthed. Moreover, the shipowner has a duty to use reasonable care to inspect the pier for hazards and take reasonable precautions to protect crew members from any possible defects."

In view of the fact that the Jones Act incorporates by reference the duties set forth in the FELA, the cases regarding a railroad's liability for off-premises injuries are also on point. *Kooker* v *Pittsburgh & Lake Erie R Co*, 258 F2d 876 (6th Cir. 1958) was the forerunner of the modern view that the nondelegable duty to provide a safe work place is not circumscribed by the fine lines of property law. In *Kooker*, the plaintiff slipped and fell while walking to his place of work on premises not owned by his employer. The Sixth Circuit held that a recovery under the FELA was permitted (*Kooker*, 258 F2d at 878):

> "[T]he duty of an employer [to provide his employees with a safe place to work] is not [limited to the exercise of dominion over the place of injury] and there are many federal cases which hold that the obligation of an employer may extend beyond its premises and to property which third persons have a primary obligation to maintain."

This interpretation of the FELA was adopted by this Court in *Shenker* v *B&O R Co*, 374 US 1 (1963) where the plaintiff was injured aboard a railroad car maintained by

a company other than his employer. Citing *Kooker* with approval, this Court stated in *Shenker*:

> "[A] railroad has the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control" (*Shenker*, 374 US at 7).
>
> * * *
>
> "Nor is it an answer to claim that B&O lacked control or supervision over the P&LE car. Such arguments have never supported an exception to the employer's duty to provide a safe place to work" (*Shenker*, 374 US at 10).

This principle was embodied in admiralty jurisprudence in *Gutierrez* v *Waterman Steamship Corp*, 373 US 206 (1963), where the plaintiff slipped and fell on the vessel's cargo, sustaining injury on a dock owned by another. As here, the shipowner sought to avoid liability on the ground that it did not control the dock where the injury occurred. The Court rejected inculcation of such niceties of property law into admiralty jurisprudence (373 US at 211-212):

> "The force of these fact findings is not lessened by the contention that respondent did not control the pier or have 'even a right to control that locus,' 301 F.2d, at 416. We doubt that respondent had no license to go upon the pier at which it was docked and clean up the loose beans, if it had wanted to; the beans were its cargo that it was unloading onto the pier. But we may put this aside, since control of the impact zone is not essential for negligence.
>
> * * *

> "Respondent allowed the cargo to be discharged in dangerous and defective bagging, from which beans were leaking before discharge of the cargo began. It had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet. When this lack of care culminated in petitioner's injury, respondent became legally liable to compensate him for the harm."

Of similar import is *Carter* v *Union R Co*, 438 F2d 208 (3rd Cir. 1971), where a railroad worker filed an FELA action to recover for injuries sustained on premises owned by another while on the way to work. The Court upheld the maintainability of suit against the employer, holding (438 F2d at 210-211):

> "The FELA imposes upon the employer a nondelegable duty to use reasonable care to furnish his employees a safe place to work . . . and this duty extends beyond its premises and to property which third persons have a primary obligation to maintain . . . This duty includes a responsibility to inspect the third party's property for hazards and to take precautions to protect the employee from possible defects . . ."

It should be borne in mind that the negligence of the shipowner in this case consisted not only in the hazardous conditions of the dock itself, but also in the ship's failure to use its spotlight to illuminate the area. In *Walton* v *Continental S.S. Co*, 66 F Supp 836 (Md, 1946), the distinction between premises liability theories and other negligence theories was drawn. In *Walton*, the seaman, while returning from shore leave, was injured when, in the darkness, he mistook a coal chute for a gangplank. The *Walton* Court held that the shipowner could not be held liable for the condition of the coal

chute or dock since they were under the control of another. Nonetheless, it was held that defendant could be held responsible for the fact that no watchman was present at the time to illuminate the area.

The lack of assistance by the watchman is particularly noteworthy in view of Kinsman Marine's constructive knowledge of Petitioner's condition. In *McDonough, supra,* as here, there was a tradition of drinking and a practice for the crew to assist a seaman in need. In *McDonough,* the plaintiff's crewmates left him unassisted whereupon he drowned. The Court held the shipowner liable under the Jones Act for its negligence in abandoning the plaintiff, even though the injuries occurred on the dock when the seaman was returning from shore leave.

In *Marceau* v *Great Lakes Transit Corp,* 146 F2d 416 (2nd Cir. 1945), the seaman was injured on the dock while returning to ship from shore leave. The injury was attributable to the ill-lit nature of the area and the spillage of the ship's cargo on the dock. The Second Circuit found that the shipowner had control over the conditions so as to be held accountable for its failure to light the dock area and for the slippery conditions caused by its cargo.

As the cited cases reflect, there is a split of authority on the fundamental issue of whether the Jones Act [and the FELA which it incorporates] create a "duty" on the employer with regard to adjacent premises which must be used as a result of the employee's job responsibilities. The state court decision is irreconcilable with the principles expressed by this Court in *Shenker* and *Gutierrez.* And, the decision below is inconsistent with the intent of Congress when it passed the Jones Act to confer upon seamen liberal protections identical to those provided railroad workers under the FELA. This Court should grant certiorari.

In lieu of the test promulgated by the lower court, Petitioner suggests that the Court decree that a shipowner's Jones Act duty to provide a safe place to work extends to areas which are, literally and figuratively, in the shadow of the ship, when used by seamen in conjunction with their maritime employment. In the modern marina, areas immediately adjacent to a vessel are of practical value only to the vessel and its crewmen. Plainly, those employed on a ship berthed at the opposite end of the facility would have no occasion to traverse the cross-over on which Szopko was injured. Other areas are truly common, such as the areas leading to the road which must be used by everyone moored at the pier. Under land-based principles of premises liability, the tenant-shipowner's area of responsibility includes those non-common facilities existing for the particular use of that vessel, such as the machine unloading its cargo. The shadow of the ship effectively approximates that area of influence of a particular vessel in contrast to the common areas over which the dock company retains sole responsibility. The shadow of the ship test thus serves as an appropriate yardstick.

The shadow of the ship also serves to establish a zone of danger. Through proximity to the vessel itself, this zone is one in which the dangers encountered by a seaman are inherently work-related. And, it is a zone which the vessel can protect through such customary means as ship lighting and the presence of a watchman. In this sense imposition of a duty on the shipowner simply effectuates the principle that a duty is to be imposed on the party able to avert the injury or remedy the hazardous conditions.

Moreover, unlike the land-based employee, the seaman's place of work is his home, his place to sleep. It is in the defendant's interest to have the seaman on the

vessel before his shift so that he can be available to serve in time of necessity and so that he can be rested before commencing his watch. Consequently, a seaman's return to the ship prior to the commencement of watch is necessitated by the vessel's character as a home, and *ipso facto* serves the interests of the shipowner.

Additionally, like railroad tracks, moored ships are geographically isolated. To travel between the place of employment and the remainder of civilization entails a particular method of ingress or egress, the use of which is necessitated by the nature of the employer's operation. As here, the risks arising in that area can be controlled by the shipowner, and they are risks to which a seaman is exposed only because of his employment.

Finally, the shadow of the ship serves as a readily ascertainable test of the nexus between the seaman's activity and his employment status. Where the activity is away from the ship's geographic sphere of activity, the nexus may be too attenuated to trigger application of the Jones Act. Where the activity is so physically proximate to the ship as to fall within its shadow, one may comfortably conclude that the seaman's presence (and exposure to the associated risks) at the site of the accident arises out of his maritime employment. In sum, this Court should adopt a test which postulates that a seaman injured in the shadow of the ship, as the result of

risks arising from his maritime employment, is within the protection of the Jones Act.

Respectfully submitted,

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Dated: April 29, 1987

APPENDICES

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APPENDIX A

OPINION

(State of Michigan — Court of Appeals)

(Released June 27, 1984)

(FRANK SZOPKO, Plaintiff-Appellee, v KINSMAN MARINE TRANSIT COMPANY, INCORPORATED, Defendant-Appellant — No. 64766)

Before: T. M. Burns, P.J.,
Wahls and W. F. Hood,* JJ.

PER CURIAM

On April 29, 1974, plaintiff brought suit under the Jones Act, 46 USC 688, for injuries allegedly sustained in the course of his employment on the S. S. Buckeye Monitor, a freighter owned by defendant. The jury found for plaintiff in the sum of $180,000, but also found that plaintiff was 95 percent negligent. The trial court accordingly entered a judgment awarding plaintiff $9,000. On plaintiff's appeal, this Court reversed and remanded for a new trial due to an off-the-record discussion between the trial judge and a juror. 96 Mich App 64, 67-69; 292 NW2d 486 (1980), *lv den* 411 Mich 902 (1981). On remand, the jury again entered a verdict in favor of plaintiff and awarded him $247,000. [1]

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* Circuit judge sitting on the Court of Appeals by assignment.

[1] The jury found total damages of $380,000 and that plaintiff was 35 percent negligent.

Plaintiff was a "wiper" in the engine department of the Buckeye Monitor. On September 1, 1973, the vessel was docked at Conneaut, Ohio to unload its cargo, which consisted of taconite pellets. The cargo was removed from the ship by way of several unloading rigs which were attached to a conveyor belt running parallel to the ship. A cross-walk was erected over the conveyor belt to allow the sailors to get to the ship. This cross-walk was approximately 25 feet from the ship. Plaintiff went ashore to have a few drinks. On his way back to the ship that evening, the pathway to the ship was unlit and taconite pellets were scattered over the path. The ship's watchman testified that he saw the plaintiff staggering to the cross-walk and then disappear. The watchman testified that he could have turned the ship's spotlight on the cross-walk to aid plaintiff, but did not do so. Plaintiff testified that his feet went out from under him and that he could not remember much after that. Apparently plaintiff fell off the cross-walk and sustained serious head injuries.

On appeal, defendant first argues that it is not liable under the Jones Act since plaintiff did not fall while on the ship or on the gangway leading to the ship. Defendant claims that the cross-walk over the conveyor belt was not under its dominion or control.

The coverage of the Jones Act extends to "any seaman who shall suffer personal injury in the course of his employment". 46 USC 688. The fact that the injury occurred on land "is not material" to the applicability of the statute. *Senko* v *LaCrosse Dredging Corp*, 352 US 370, 373; 77 S Ct 415; 1 L Ed 2d 404, 408 (1957). In *O'Donnell* v *Great Lakes Dredge & Dock Co*, 318 US 36; 63 S Ct 488; 87 L Ed 596 (1943), the Court held that a seaman could recover for injuries sustained on land. "The right of recovery in the Jones Act is given to the seaman as such,

and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury was inflicted but on the nature of the service and its relationship to the operation of the vessel." *Id.*, 87 L Ed 596, 602.

The term "course of employment" as used in the statute "is the equivalent of the 'service of the ship' formula used in maintenance and cure cases". *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129; 80 S Ct 247; 4 L Ed 2d 191 (1959). The United States Supreme Court has long held that a seaman on shore leave is in the service of the ship. *Warren* v *United States*, 340 US 523; 71 S Ct 432; 95 L Ed 503, 509 (1951). A seaman on shore leave is, therefore, in the course of his employment. *Central Gulf Steamship Corp* v *Sambula*, 405 F 2d 291, 298-299 (CA 5, 1968); *Marceau* v *Great Lakes Transit Corp*, 146 F 2d 416, 418-419 (CA 2, 1945).

Defendant cites *In re Petition of Atlass*, 350 F 2d 592 (CA 7, 1965), where the court held that plaintiffs were not in the course of their employment "when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors", or when they attempted to return to the vessel, "one in a drunken stupor and the other badly intoxicated". 350 F 2d 592, 597. The Supreme Court rejected this type of reasoning in *Aguilar* v *Standard Oil Co*, 318 US 724; 63 S Ct 930; 87 L Ed 1107 (1943), noting that "it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings". 87 L Ed 1107, 1115. "The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports." *Id.*

Defendant claims that it had no duty to concern itself with the conditions on the dock adjacent to its ship, over which it had no dominion or control, and therefore

it cannot be held negligent for injuries arising from those conditions. *Bates* v *Prudential-Grace Lines, Inc*, 497 F 2d 900 (CA 9, 1974) (adopting the lower court decision reported at 375 F Supp 774); *Paul* v *United States*, 205 F 2d 38 (CA 3, 1953); *Todahl* v *Sudden & Christenson*, 5 F 2d 462 (CA 9, 1925). Defendant is mistaken, however, in asserting that *Hamilton* v *Marine Carriers Corp*, 332 F Supp 223 (ED Pa, 1971) is the only decision to the contrary. In *Magnolia Towing Co* v *Pace*, 378 F 2d 12 (CA 5, 1967), the Court held that a tugboat operator injured in an automobile driven by the ship owner's employee en route to the work site could recover under the Jones Act. The seaman in *Marceau, supra*, was injured when he slipped and fell on the dock within a few feet of the ship's ladder. "The plaintiff accordingly made out a prima facie case by furnishing evidence of a slippery and ill-lighted place on the dock which he had to traverse in order to ascend the ladder upon returning to work." 146 F 2d 419.

Review of the decisions cited by defendant suggest that they make little sense in light of the Supreme Court precedents. If a seaman on shore is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the ship owner's liability for its negligence at the end of the gangplank. Such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of his employment even though off the ship.

Moreover, a finding that defendant's duty extends beyond the ship itself does not make it "liable for the dock owner's negligence". *Paul, supra*, p 43. Under the Jones Act, an employer has a duty to provide seamen with a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel. *Atlass, supra*, p 599; *Marceau, supra*, p 419. An employer may also be held liable "for permitting a

dangerous condition emanating from the vessel to arise at the place where [the employee] was injured even though it lacked control or right of control over that place". *Hagans* v *Ellerman & Bucknell Steamship Co*, 318 F 2d 563, 579 (1963).

As a trial judge noted when denying defendant's motion for a directed verdict in the instant case, there was evidence from which a jury could find defendant negligent on several theories:

> "The jury could find, among other things, that a reasonable, prudent shipowner, knowing that the Plaintiff was staggering and probably drunk, knowing of the taconite spills and the necessity of crossing the conveyor, would have sent help. The jury could find that a reasonable, prudent shipowner, knowing that the cross-over of the conveyor was poorly lighted and that taconite spills could cause persons to slip and fall, would warn its crew and advise crewmembers of the danger of their returning at night, or even suggest to the crew to carry flashlights.
>
> "The prudence of any or all of the foregoing might be underlined in the jury's mind by common knowledge that seamen often get drunk on shore leave." Footnote omitted.

"The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." *Ferguson* v *Moore-McCormack Lines*, 352 US 521, 524; 77 S Ct 457; 1 L Ed 2d 511 (1957). A direct verdict is possible "only when there is a complete absence of probative facts, supporting the plaintiff's position". *Allen* v *Seacoast Products, Inc*, 623 F 2d 355, 360 (CA 5, 1980). The ship owner must show that its inaction

"could not have been even a contributing cause" of the injury. *Reyes* v *Vantage Steamship Co*, 609 F 2d 140, 146 (CA 5, 1980). Here, as in *Marceau, supra*, p 419, "it was for the defendant to show that it had no opportunity to ascertain conditions before the accident occurred and it made no attempt to make such a showing". Considering this standard, the trial court properly denied defendant's motion for a directed verdict.

Defendant next raises several arguments regarding the trial court's jury instructions. The trial court did not err in instructing on the standard of liability under the Jones Act. The duty assigned to ship owners by the Jones Act, like that of employers under the federal employer's liability act, is a non-delegable duty and continues even when employees "are required to go onto the premises of a third party over which the [employer] has no control". *Shenker* v *Baltimore & Ohio RR Co*, 374 US 1; 83 S Ct 1667; 10 L Ed 2d 709 (1963). The Jones Act clearly provides that seamen enjoy all the rights and remedies available to railroad employees. 46 USC 688. The trial court properly instructed on the standard of liability. The trial court also clarified this matter by instructing that if "the only proximate cause of the occurrence was the conduct of the dock owner, who is not a party to the suit, then your verdict should be for the defendant". While not going as far as defendant wished, this instruction accurtately stated the law.

The instruction which assigned the risk of uncertainty in the amount of damages to the defendant was also a correct statement of the law. *Storey Parchment Co* v *Peterson Parchment Paper Co*, 282 US 555; 51 S Ct 248; 75 L Ed 544 (1931), citing: *Allison* v *Chandler*, 11 Mich 542 (1863); *Routsaw* v *McLain*, 365 Mich 167, 170-171; 112 NW2d 123 (1961). Such an instruction is properly given if it is "limited to the question of the amount of

damages". *Belue* v *Uniroyal Inc*, 114 Mich App 589, 595; 319 NW2d 369 (1982). The trial court in the instant case properly restricted this instruction to the issue of damages. Contrary to defendant's argument, the judge specifically admonished the jury not to award speculative damages, or damages unsupported by the evidence. The trial court also properly instructed the jury to reduce its award of future damages to its present value. *Petition of the United States Steel Corp*, 436 F 2d 1256, 1280 (CA 6, 1970); *Belue, supra*, pp 598-599.

Defendant next argues that the trial court improperly admitted the former testimony of Dr. William Anderson, who treated plaintiff shortly after the accident. Dr. Anderson testified at the first trial that plaintiff had no abnormal neurological signs, was recovering normally from the wound, and he felt that plaintiff could go back to work in a reasonable period of time. Dr. Anderson practices medicine in Ohio and did not appear for the second trial. Plaintiff offered to introduce his testimony from the first trial. Defendant objected claiming that he could procure Dr. Anderson's attendance the next morning. The trial court refused to delay the trial and allowed the testimony from the first trial to be read into evidence. The trial court informed defendant that it could still produce Dr. Anderson but that it would not allow defendant to repeat questions that were read into evidence from the first trial since these questions were already asked and answered. Defendant failed to produce Dr. Anderson. Defendant failed to present any medical evidence.

Defendant argues that Dr. Anderson was not an expert witness and since he was available to testify the next day, GCR 1963, 302.4(3), precluded the trial court from allowing his former testimony to be read as evi-

dence.[2] Contrary to defendant's claim, Dr. Anderson was an expert witness. Dr. Anderson's testimony contained observations and conclusions which were based on his professional experience as a doctor. A lay person could not have made the same conclusions. MRE 701.

Since Dr. Anderson was an expert witness, the trial court properly applied the court rules. While MRE 804(b) requires that a showing that a witness is unavailable to testify before his former testimony is admitted as an exception to the hearsay rule, a special court rule, GCR 302.7 states:

> "In the absence of or failure of the expert witness to appear at trial, such deposition or video tape of such deposition may be offered as evidence at the trial. No adjournment of trial shall be granted because of unavailability of expert witnesses at the time of trial."

The purpose behind GCR 1963, 302.7 is to help resolve Wayne County Circuit Court's docket congestion. Delays caused by the unavailability of busy expert witnesses were in part responsible for this docket congestion. 2 Honigman & Hawkins, *Michigan Court Rules Anno 1983 Supp*, p 29.

Considering this special court rule and the purpose for which it was implemented, we find that the trial court properly admitted the former testimony of Dr. Anderson. While plaintiff did not specifically lay a foundation to establish that Dr. Anderson was unavailable to testify at trial, the evidence indicated that he practiced medicine

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[2] Dr. Anderson's testimony from the first trial was treated by the parties and the court as if it were a deposition. We see no problem with this and feel that the general court rules were properly considered. We note that MRE 804(b)(1) treats former testimony from a trial the same as a deposition.

in Ohio and could not make it to Detroit until the next morning. Since Dr. Anderson failed to appear at trial, his former testimony was properly admitted. We specifically note that the requirement of unavailability has been liberalized for the admission of former testimony because former testimony's inherent reliability makes it superior to other forms of hearsay. Weinstein, Burger, *Weinstein's Evidence* ¶ 804(b)(1)[01] (Bender, 1981).

Defendant was also not prejudiced by the admission of Dr. Anderson's former testimony. Defendant's only real claim of prejudice is that the jury could not compare Dr. Anderson's scholarly demeanor with plaintiff's consulting expert's demeanor. Plaintiff's consulting expert testified by video deposition. Defendant was not prejudiced. Defendant could have presented Dr. Anderson as a witness and asked questions which were not already read into evidence. The trial court had the discretion to limit the defendant's proposed examination of Dr. Anderson. MRE 403. We also note that despite ample time to do so, defendant failed to present an expert consultant to rebut the opinions of plaintiff's expert consulting physician.[3]

Defendant next argues that plaintiff's attorney made improper arguments before the jury. While plaintiff's attorney should not have stated that defendant failed to provide plaintiff with proper medical treatment, any error was cured by the trial court's instruction. Defendant's

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[3] Another problem with defendant's argument that it was prejudiced by the admission of Dr. Anderson's testimony is that this testimony was mostly irrelevant. The factual issue to be determined from this testimony was plaintiff's current condition and prognosis. Dr. Anderson's prognosis was made shortly after the accident, approximately 10 years ago. While this testimony was relevant to show plaintiff's condition, shortly after the accident, the relevancy of Dr. Anderson's prognosis greatly decreased after 10 years. Moreover, if Dr. Anderson's prognosis was correct, defendant could have submitted updated medical evidence to verify this.

other argument on this issue is without merit. *Megge* v *Lumbermen's Mutual Casualty Co*, 45 Mich App 119, 124; 206 NW2d 245 (1973).

Defendant's argument that the trial court erred by allowing plaintiff's attorney to rehabilitate plaintiff's testimony by introducing prior consistent statements is without merit. The trial judge did not abuse his discretion by admitting prior consistent statements. *Brown* v *Pointer*, 390 Mich 346, 352; 212 NW2d 201 (1973). The trial court also correctly denied the admission of evidence of a subsequent altercation in which plaintiff was hit on the head. This evidence was not relevant since defendant furnished no factual basis to conclude that the fight referred to caused any of plaintiff's injuries. MRE 401.

Defendant's numerous issues lack merit. The trial court is, therefore, affirmed.

Affirmed.

/s/ Thomas M. Burns
/s/ Myron H. Wahls
/s/ William F. Hood

APPENDIX B

OPINION

(State of Michigan — Supreme Court)

(Filed December 17, 1986)

(FRANK J. SZOPKO, Plaintiff-Appellee, v KINSMAN MARINE TRANSIT COMPANY, Defendant-Appellant — No. 74646)

BEFORE THE ENTIRE BENCH

CAVANAGH, J.

This case plunges the Court into the depths of uncharted waters — federal admiralty law.[1]

Facts

Plaintiff Szopko was a crew member of the S.S. Buckeye Monitor, a Great Lakes freighter owned by defendant Kinsman Marine. The vessel was docked at Conneaut, Ohio, to unload a cargo of taconite pellets. Pittsburgh and Conneaut Dock Company owned and operated the dock and was responsible for the unloading operation. The dock company is not a party in this case.

The Buckeye Monitor's cargo was unloaded by a conveyor belt system. The dock company constructed a stairway and grated ramp to allow seamen and longshoremen to walk over the conveyor belt. This "crossover ramp" was located on the dock company's

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[1] We have reviewed claims brought under the Jones Act before, but none of the cases involved the issues before us today. For example, in *Manion* v *State Hwy Comm*, 303 Mich 1; 5 NW2d 527 (1942), plaintiff's claim was dismissed on the basis of governmental immunity. Similarly, a jury verdict was reversed on the basis of insufficient evidence in *King* v *Nicholson Transit Co*, 329 Mich 586; 46 NW2d 389 (1951).

property near the water's edge, and one flight of stairs was approximately twenty-five feet from the ship's ladder.

On September 2, 1973, plaintiff worked his customary eight-hour shift (8:00 a.m. to 4:00 p.m.). Plaintiff went into the town to have a few drinks around 6:30 p.m. Before leaving, his supervisor asked him to purchase a carton of cigarettes in town.

Plaintiff started to walk back to the ship at approximately 11:30 p.m. He met two fellow crewmembers (Adamzak and Johnson), who testified that defendant's [*sic*] gait was slow and staggering. Plaintiff told these men to leave him alone, indicating that he could make it to the ship without their assistance. Plaintiff testified at his second trial[2] that he slipped on the dock near the stairway to the crossover ramp due to the darkness and spillage of taconite pellets. Adamzak testified that the area was "all gravel" and "kind of dim," but he had no difficulty walking in the area. Johnson stated that he encountered no difficulty walking in the area and did not know of any debris in the area at the time of the accident.

The examining physician testified that the plaintiff received a mild concussion and a very large cut on the head which required several stitches to close. Plaintiff was held for five days for observation and released. Plaintiff testified that he continued to have headaches and dizziness after the accident and that he could no longer work on ships.

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[2] Plaintiff's first trial resulted in a verdict of $180,000, with a finding of ninety-five percent comparative negligence, for a judgment of $9,000. The Court of Appeals reversed and remanded for a new trial on the sole basis that the trial judge improperly engaged in an off-the-record discussion with a juror. 96 Mich App 64; 292 NW2d 486 (1980).

Plaintiff's second trial resulted in a verdict of $380,000, and a finding of thirty-five percent comparative negligence, for a judgment of $247,000. The Court of Appeals affirmed in an unpublished decision. We granted leave to appeal. 422 Mich 933 (1985).

Background

In order to analyze the questions presented, it is helpful to understand some basic principles of admiralty law. In general, a seaman has three basic theories of recovery: unseaworthiness of a vessel, maintenance and cure, and an action for damages under the Jones Act, 46 USC 688.

A seaman who becomes ill or injured while "in the service of the ship"[3] is entitled to "maintenance and cure" ("cure" from the Latin noun *cura*, care, healing). Recovery is in the form of a per diem living allowance and payment of medical costs. Recovery is not based on fault and is analogous to workers' compensation. Plaintiff did not make a claim for maintenance and cure in this case.

A seaman may also sue on the basis of the vessel's "unseaworthiness,"[4] since a shipowner has an absolute, nondelegable duty to furnish a vessel that is reasonably safe for its intended purposes. Plaintiff's claim under this theory was rejected prior to both trials, and the unseaworthiness of the vessel is not at issue here.

We stress that plaintiff's sole basis for recovery in this case is grounded upon the Jones Act. It is important

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[3] See *Aguilar* v *Standard Oil Co*, 318 US 724, 730-731, n 6; 63 S Ct 930; 87 L Ed 1107 (1943).

[4] See *Shemman* v *American Steamship Co*, 89 Mich App 656, 665; 280 NW2d 852 (1979); *Hubbard* v *Faros Fisheries, Inc*, 626 F2d 196 (CA 1, 1980).

to recognize that the three theories are separate, and each has its own body of interpretative case law.

The Jones Act states that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ." The parties agree that there are two basic elements in a Jones Act claim. First, the injury must have occurred "in the course of . . . employment." Second, the injury must have been caused in some way by the defendant's negligence. In interpreting claims under the Jones Act, several courts have looked at analogous cases under the Federal Employer's Liability Act, 45 USC 51-60, since the Jones Act was meant to provide statutory rights and remedies comparable to those granted to railroad workers under the FELA.

Analysis

Defendant argues that the lower courts erred in failing to direct a verdict in its favor for two reasons. First, plaintiff was not "in the course of his employment" for purposes of the Jones Act. Second, even if he was, the defendant was not negligent since it owed no duty to the plaintiff under the facts of this case. We will analyze these arguments separately, keeping in mind the appropriate standard of review for a denial of a motion for a directed verdict.[5]

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[5] "A motion for directed verdict may only be granted when no factual question exists upon which reasonable minds can differ. *Caldwell* v *Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975). In reviewing a trial court's denial of a motion for directed verdict, this Court views the evidence in the light most favorable to the nonmoving party to determine whether a prima facie case has been established. *Id.* See also *May* v *Parke, Davis & Co*, 142 Mich App 404, 411; 370 NW2d 371 (1985)." *Latimer* v *William Mueller & Son, Inc*, 149 Mich App 620, 629-630; 386 NW2d 618 (1986). See also *Shemman*, n 5 *supra*, p 664.

I

WAS THE PLAINTIFF "IN THE COURSE OF HIS EMPLOYMENT" AT THE TIME OF THE INJURY?

The plaintiff's argument was accepted by the Court of Appeals which concluded:

> "The term 'course of employment' as used in the statute 'is the equivalent of the "service of the ship" formula used in maintenance and cure cases.' *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129; 80 S Ct 247; 4 L Ed 2d 191 (1959). The United States Supreme Court has long held that a seaman on shore leave is in the service of the ship. *Warren* v *United States*, 340 US 523; 71 S Ct 432; 95 L Ed 503, 509 (1951). A seaman on shore leave is, therefore, in the course of his employment. *Central Gulf Steamship Corp* v *Sambula*, 405 F2d 291, 298-299 (CA 5, 1968); *Marceau* v *Great Lakes Transit Corp*, 146 F2d 416, 418-419 (CA 2, 1945)."

Defendant concedes that a seaman on shore leave is "in the service of the ship" for purposes of recovering *maintenance and cure*. However, defendant argues that the Court of Appeals erred in concluding that a seaman on shore leave is "in the course of his employment" for the purposes of the Jones Act. Our review of the cases cited by both parties convinces us that the Court of Appeals clearly erred, and that defendant was entitled to a directed verdict.

In *Braen, supra*, pp 132-133, petitioner was *ordered* to replace worn decking on a repair raft. He was injured when a catwalk gave way, and he brought suit under the Jones Act. In reviewing whether the injury occurred in the course of petitioner's employment, the United States Supreme Court stated:

"The fact that the injury did not occur on the vessel is not controlling, as *Senko* v *LaCrosse Dredging Corp*, [352 US 370, 373; 77 S Ct 415; 1 L Ed 2d 404 (1957)], holds. *A 'seaman' may often be sent off ship to perform duties of his employment. O'Donnell* v *Great Lakes [Dredge & Dock] Co*, [318 US 36; 63 S Ct 488; 87 L Ed 596 (1943)]. In *Marceau* v *Great Lakes Transit Corp*, (CA 2 NY [1945]) 146 F2d 416, a ship's cook was allowed to recover under the Jones Act when, *pursuant to duty*, he was returning to the ship and was injured on the dock while approaching a ladder used as ingress to the vessel.

"We held that a seaman who was injured on the dock while departing from the ship on shore leave was in the service of the vessel and was entitled to recover for maintenance and cure in Aguilar v Standard Oil Co, 318 US 724 [63 S Ct 930; 87 L Ed 1107 (1943)]. It was there recognized that a seaman is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high sea. *Id.*, at 736, 737. We also held that a seaman injured in a dance hall while on shore leave was in the service of his ship in *Warren* v *United States*, 340 US 523, 529. These two cases were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. *They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used*

in maintenance and cure cases. See Gilmore and Black, The Law of Admiralty, p 284. And see *O'Donnell* v *Great Lakes [Dredge & Dock] Co, supra* at 43; *Marceau* v *Great Lakes Transit Corp, supra.*

> *"Petitioner in the present case was ordered by a superior to perform some carpentry work on a raft which lay between the lighter and the dock.* Petitioner was injured, as we have said, while on the catwalk attempting to move the raft into position for boarding. The raft was used to facilitate chipping, painting and welding on respondent's vessels. Cf. *Grant Smith-Porter Ship Co* v *Rohde,* 257 US 469 [42 S Ct 157; 66 L Ed 321 (1922)]. New decking was to be installed on the raft. The fact that the raft was not presently being used to repair respondents' barge is in our view immaterial. *Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders.* No more is required by the Jones Act, as the *O'Donnell* case indicates, *petitioner being a seaman who was injured as a consequence of the negligence of his employer."* (Emphasis supplied.)

We agree with the defendant that the Court of Appeals placed improper emphasis on portions of *Braen,* while ignoring its holding. *Aguilar* and *Warren* are relevant guides in determining the meaning of "in the course of his employment," but those cases involved claims for maintenance and cure.

As interpreted by *Braen,* the seaman must be "doing the work of his employer pursuant to his employer's orders" at the time of the injury. No more is required under the act (*Braen, supra*), but we are asked whether the act can be satisfied with less. Cf. *Vincent* v *Harvey Well Service,* 441 F2d 146, 148 (CA 5,

1971).[6] In answering this question, we note that recovery under the Jones Act does not depend on the location of an injury, but instead "on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *O'Donnell, supra,* pp 42-43. We cannot ignore the phrase "in the course of his employment," because it was intended to mean what it says. *Id.*

Under these facts, we find that the Court of Appeals erred by taking an analytical step which implies that a seaman on shore leave is always in the course of his employment.

The Court of Appeals cited *Marceau, supra,* and *Sambula, supra,* in support of its analytical step. In *Marceau,* the plaintiff was ashore on personal business, but was ordered to return at a designated time to provide the night lunch. He slipped on the dock near the ship's ladder, and sued for damages under the Jones Act. The *Marceau* court stated:

> "The defendant's other two contentions are likewise without merit. The *plaintiff was acting under orders when he returned to the ship.* Consequently at the time of the accident he was not only acting in the course of his employment *but suffered his*

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[6] In *Vincent,* a seaman employed on an amphibious drilling rig was injured while riding to work as a passenger in an automobile furnished by his employer. The court noted that a seaman is plainly in the course of his employment when he is doing the work of his employer pursuant to his employer's orders. This instant case, like *Vincent,* involves the more complicated situation involving activity done off the ship and not strictly "pursuant to duty." In affording coverage, the *Vincent* court noted several factors which demonstrated that the employer had substantial interests in providing transportation to the crew. These included the location and nature of the submersible rig, its lack of sleeping and eating quarters, and the remote proximity of the rig to land. None of these factors are present in the instant case.

> *injuries while on property in the possession and under the control of the defendant as lessee and over which the plaintiff had to pass in order to return to his work.* Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route. *Wong Bar* v *Suburban Petroleum Transport*, 2 Cir, 119 F2d 745 [1941]." (Emphasis supplied.) *Id.*, p 418.

Even though the *Marceau* court did not have the benefit of the *Braen* analysis at the time it rendered a decision, *Marceau* still emphasized that "the plaintiff was acting under orders when he returned to the ship." Szopko notes that *Braen* cited *Marceau*. However, *Braen* also noted that the petitioner in *Marceau* was acting "pursuant to duty." Thus, the relevant focus in *Marceau* was on whether the plaintiff was performing his duty in the course of his employment at the time of the injury.[7]

The Court of Appeals also cited *Sambula*. In that case, the plaintiff was assaulted while on shore leave and received a cut beside his eye. The plaintiff was taken to a public hospital and later allowed to join his vessel for the remainder of the voyage. Complications resulted in the loss of the plaintiff's eye. The plaintiff argued that he should have been treated by a specialist and that the shipowner was negligent in the administration of medical care.

The *Sambula* court stated:

> "In *Nowery* v *Smith*, ED Pa 1946, 69 F Supp 755, aff'd 3 Cir 1947; 161 F2d 732, it was held that a

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[7] We also note that *Marceau* is distinguishable because the injury occurred while on property under the control of the shipowner. See Section II.

> seaman was 'in the course of his employment,' as that phrase is used in the Jones Act, while enjoying his shore leave in a foreign port." 405 F2d 298.

However, the court also noted:

> "The preceding language from *Nowery* v *Smith* does not mean that a seaman may recover under the Jones Act for all injuries sustained while he is on shore leave; it means only that recovery cannot be denied solely on the ground that a seaman, while on shore leave, is not 'in the course of his employment.' Annot, 4 L Ed 2d 1777, 1782 at fn 5." *Id.*, p 298, n 4.

Accordingly, the Court of Appeals erred in citing *Marceau* and *Sambula* for the proposition that a seaman on shore leave is always in the course of his employment.

We hold that, for purposes of a Jones Act claim, a seaman is in the course of his employment if he is doing the work of his employer pursuant to his employer's orders, *Braen, supra,* or when the nature of the service rendered and its relation to the operation of the vessel, *O'Donnell, supra,* is of such a nature that a seaman may be deemed in the course of his employment. We decline to adopt a more precise rule since this determination should be made case by case.

However, given the facts of the present case, we find that plaintiff was not in the course of his employment at the time of the injury. By his own admission, he was off duty and on his own time. He did not have to return to work until 8:00 a.m. the next morning. He was

returning from several hours of drinking, clearly a personal excursion.[8]

Plaintiff finally argues that he was in the course of his employment because he was returning with a carton of cigarettes he purchased at the request of his supervisor. The Court of Appeals analysis did not require a discussion of this theory. However, even taken in the light most favorable to the plaintiff, the proofs indicate that this action was strictly a personal favor as opposed to an order from a supervisor. According to Szopko's own testimony, he was off duty until his regular shift started the next morning and was not working at the time of the injury.[9]

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[8] See *Petition of Atlass*, 350 F2d 592, 597 (CA 7, 1965):

> "Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated."

[9] Plaintiff also testified on redirect examination as follows:

> "*Q.* Now when you went ashore, on that September 1, 1973, in the twilight of the evening, you had to perform a service for your engineer in getting him some cigarettes, right?
>
> "*A.* Yes sir.
>
> "*Q.* And he told you that, right?
>
> "*A.* Yes sir. He asked me, he didn't tell me.
>
> "*Q.* He is your boss?
>
> "*A.* Yes sir, he is my engineer."

Although the trial court found that this was a personal favor rather than a duty, both lower courts ignored this finding in their subsequent rulings.

For all of these reasons, we hold that the lower courts erred in failing to direct a verdict in defendant's favor, because plaintiff was not "in the course of his employment" at the time of his injury.

II

Although the location of the injury does not control for purposes of determining whether a seaman is in the course of his employment, *O'Donnell, supra,* it may have a bearing on whether defendant was negligent. Since a Jones Act claim is grounded on the defendant's negligence, the defendant must owe some duty of reasonable care to the plaintiff under the circumstances. Accordingly, even *if* we were to assume that the plaintiff was acting in the course of his employment, his claim would fail for another reason. We find that the trial court erred in failing to direct a verdict in defendant's favor, since the defendant did not owe the plaintiff a duty of care under the facts of this case.

The Court of Appeals addressed and rejected defendant's second claim of error as follows:

> "Defendant claims that it had no duty to concern itself with the conditions on the dock adjacent to its ship, over which it had no dominion or control, and therefore it cannot be held negligent for injuries arising from those conditions. *Bates* v *Prudential-Grace Lines, Inc,* 497 F2d 900 (CA 9, 1974) (adopting the lower court decision reported at 375 F Supp 774 [WD Wash, 1972]); *Paul* v *United States,* 205 F2d 38 (CA 3, 1953); *Todahl* v *Sudden & Christenson,* 5 F2d 462 (CA 9, 1925). Defendant is mistaken, however, in asserting that *Hamilton* v *Marine Carriers Corp,* 332 F Supp 223 (ED Pa, 1971) is the only decision to the contrary. In *Magnolia Towing Co* v *Pace,* 378

F2d 12 (Ca 5, 1967), the Court held that a tugboat operator injured in an automobile driven by the ship owner's employee en route to the work site could recover under the Jones Act. The seaman in *Marceau, supra,* was injured when he slipped and fell on the dock within a few feet of the ship's ladder. 'The plaintiff accordingly made out a prima facie case by furnishing evidence of a slippery and ill-lighted place on the dock which he had to traverse in order to ascend the ladder upon returning to work.' 146 F2d 419.

"Review of the decisions cited by defendant suggest that they make little sense in light of the Supreme Court precedents. If a seaman on shore leave is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the ship owner's liability for its negligence at the end of the gangplank. Such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of his employment even though off the ship.

"Moreover, a finding that defendant's duty extends beyond the ship itself does not make it 'liable for the dock owner's negligence.' *Paul, supra,* p 43. Under the Jones Act, an employer has a duty to provide seamen with a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel. [Petition of] *Atlass,* [350 F2d 592, 599 (CA 7, 1965)]; *Marceau, supra,* p 419. An employer may also be held liable 'for permitting a dangerous condition emanating from the vessel to arise at the place where [the employee] was injured even though it lacked control or right of control over that place.' *Hagans* v *Ellerman & Bucknall Steamship Co,* 318 F2d 563, 579 (CA 3, 1963)."

A

We first note that the Court of Appeals decision on this issue was based on its faulty initial premise, i.e., that "a seaman on shore is in the course of his employment for purposes of Jones Act coverage." In other words, since a seaman on shore is not necessarily in the course of his employment, it is *not* contradictory to limit a shipowner's liability for negligence at the gangway under the appropriate circumstances.

Contrary to the Court of Appeals analysis, we find that the rule summarized in *Bates* precludes recovery under these facts. In *Bates*, plaintiff left his ship on a personal errand, and stepped into a hole located some 400 to 600 feet from the ship. The pier was owned, operated and controlled by the Chilean government. *Bates* first cited *Todahl* as follows:

> "[T]he substantive duty of a vessel owner to provide a seaman with a safe place to work did not 'extend to his protection when going beyond the premises of his employment for purposes of his own and over premises of which his employers had no dominion or control.'" 375 F Supp 775.

The *Bates* court continued:

> "The Second Circuit also has followed the general rule of *Todahl*. In *Wheeler* v *West India SS Co*, 205 F2d 354 (2d Cir 1953), the Court of Appeals in a per curiam opinion adopted the opinion of the District Court for the Southern District of New York which noted:
>
> > "'Though the defendant was duty-bound to provide reasonably safe means of immediate access to the vessel (citing author-

> ity), shipowners have generally been held not liable for unsafe conditions in places *beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties.'*
>
> * * *
>
> "District courts in the Fourth and Fifth Circuits have cited *Todahl* and denied recovery for seamen under even more compelling circumstances than are present in the case now before this Court. In both *Lemon* v *United States*, 68 F Supp 793 (D Md 1946), and *Miles* v *States Marine Lines, Inc*, 352 F Supp 1370 (ED Tex 1971), seamen were killed while attempting to return by small boat to their ships which were anchored off shore. The courts found that the shipowners had no duty to provide a means of transportation between ship and shore for seamen granted shore leave. It followed that the shipowners were not liable for any negligent injury to seamen who arranged their own transportation.[6]

"[6] The Supreme Court also gave some support to the holding in *Todahl* in *Aguilar* v *Standard Oil Co of New Jersey*, 318 US 724, 736, 737; 63 S Ct 930, 937; 87 L Ed 1107 (1943), when it stated:

> "'Consequently the fact that the shipowner might not be liable to the seamen in damages for the dock-owner's negligence, cf. *Todahl* v *Sudden & Christenson*, 9 Cir, 5 F2d 462 (CCA), does not relieve him of his duty of maintenance and cure.'" 375 F Supp 776.

As in *Bates*, the evidence in this case established that Szopko was injured on a dock owned and operated by the dock company. The conveyor belt system was constructed and operated by the dock company, which had exclusive control over and responsibility for the unloading operation. The crewmen who preceded Szopko

to the ship without injury testified that, although the dock area was dim, they did not have any trouble seeing where they were going.

Assuming control over the dock area is required, plaintiff points to the following evidence which indicates that the defendant had "de facto control" over these dockside conditions. First, defendant's cargo littered the crossover ramp area. Second, defendant had the ability to illuminate the area. Third, defendant had a watchman on board who should have assisted the plaintiff.

However, even viewing these facts in the light most favorable to the plaintiff, we cannot conclude that they support the conclusion that the defendant exercised any real control over the dock area. Instead, the evidence clearly showed that the dock company was solely responsible for the area where the injury occurred. Plaintiff's answers to defendant's interrogatories indicated that plaintiff believed that the dock company owned the conveyor system and crossover ramp. Several dock company employees testified about "their" equipment. Finally, in denying the motion for directed verdict, the trial court noted that the shipowner exercised no control over the dock. Since any evidence of control was lacking and for the other reasons set forth below, we believe that the defendant was entitled to a directed verdict.

B

Second, the cases cited by the Court of Appeals have either been discredited or are distinguishable.

For example, in *Hamilton, supra,* plaintiff was injured on the dock owner's property while returning from a personal errand. *Hamilton* relied on a series of cases, including *Law* v *Victory Carriers, Inc,* 432 F2d 376 (CA 5, 1970), which held that longshoremen could recover from a shipowner under the doctrine of unseaworthiness even

though the injury occurred off the vessel. *Law* was later reversed by the United States Supreme Court. *Victory Carriers, Inc* v *Law*, 404 US 202; 92 S Ct 418; 30 L Ed 2d 383 (1971).

Furthermore, *Hamilton* relied on a series of cases involving FELA claims. While we have already acknowledged that FELA cases are generally analogous, we decline to adopt *Hamilton*'s reasoning in the face of clearly applicable cases interpreting the Jones Act.[10] Accord *Bates, supra*, 497 F2d 900, n 1.

We also reject the Court of Appeals reliance on *Magnolia Towing Co* v *Pace, supra*. The only issue decided

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[10] 1B Benedict, Admiralty (7th ed), ch 3, § 29, n 21 pp 3-206–3-208 states:

> "The recent district court decision in *Hamilton* v *Marine Carriers Corp*, 332 F Supp 223; 1971 AMC 2454 (ED Pa 1971), raises many troublesome questions concerning shipowner responsibility for pier conditions.
>
> * * *
>
> "Although *Hamilton* raises interesting agency and scope of duty questions, and general adoption of its rationale would greatly facilitate recovery for seamen injured ashore, it is doubtful that its expansive reading of the law will be accepted. In the one case which has considered *Hamilton* as precedent, *Bates* v *Prudential-Grace Lines, Inc, supra*, the Ninth Circuit flatly stated, 'we expressly disapprove and reject the *Hamilton* reasoning.' The effect of *Hamilton* would be to reject *Paul* v *United States, supra*, and the many decisions which have since adopted its position. The lower court in *Bates* was doubtful that 'either *Carter* [v *Union R Co*, 438 F2d 208 (CA 3, 1971)] or *Shenker* [v *Baltimore & Ohio R Co*, 374 US 1; 83 S Ct 1667; 10 L Ed 2d 709 (1963)] was intended to abrogate [the] well established rule' that the shipowner's liability normally terminated at the gangplank. *Hamilton* is not incorrect in noting that jurisprudential advances under the FELA inure to the benefit of seamen under the Jones Act, see § 2 *supra*; however, the courts must still take account of the differences between these land and sea employments, and cannot always automatically apply FELA law to seafaring operations when to do so would be incompatible with principles developed under the general maritime law. In the case at hand, the court neglected to fully consider the distinction."

in that case involved whether plaintiff was a "seaman" at the time of the injury. *Id.*, p 13. *Magnolia* does not contain a meaningful discussion of either the "in the course of his employment" test, or the nature of the duty owed to a seaman injured on shore.

The Court of Appeals also improperly relied on *Hagans* v *Ellerman & Bucknall Steamship Co, supra,* for the proposition that an employer may be liable for a dangerous condition emanating from the vessel even though the employer lacks control of the premises. There, plaintiff Hagans was a *longshoreman* injured during unloading operations. Plaintiff had no right of recovery under the Jones Act, and the case is distinguishable on that basis alone. Furthermore, a close reading of *Hagans* indicates that the court accepted the defendant's argument that it owed no duty to furnish the plaintiff with a safe place to work, since it had no control over the place of the injury. *Hagans, supra,* pp 577-579, 588.

C

Plaintiff directs us to cases holding that a seaman is in the course of his employment when coming to or returning from work and upon the employer's premises or upon adjacent property if approaching by a customary route. See *McDonough* v *Buckeye SS Co,* 103 F Supp 473 (ND Ohio, 1951), aff'd 200 F2d 558 (CA 6, 1952), citing *Marceau, supra.*

We find *McDonough* inapposite on its facts. There, a fellow crew member (Cox) voluntarily undertook to assist the plaintiff aboard after the plaintiff was denied entry to the dock area due to his intoxicated condition. When the plaintiff staggered and fell a second time, Cox left the plaintiff in a position dangerously close to the water. Cox went aboard to summon help, but plaintiff fell into the water to his death before help returned.

The plaintiff's cause of action in *McDonough* was predicated upon the negligence of his fellow crewman. Thus, the case did not focus on the ownership or control of the dock. The court noted that once Cox voluntarily took charge of a helpless person, he had a duty to exercise reasonable care for that person's safety. In the present case, however, defendant's agents never assumed responsibility for plaintiff's safe passage to the vessel.

D

Both lower courts erred in relying on distinguishable or discredited cases which indicate that a shipowner's duty extends to areas over which it has no control. On the contrary, we embrace the rule announced in *Bates*, and hold that a defendant's duty to provide a seaman with a safe place to work does not extend beyond the immediate vicinity of the gangway when the seaman is not in the performance of his duties. *Bates, supra; Todahl, supra*. Accordingly, defendant was entitled to a directed verdict under the facts of this case.

III

The defendant also argues that the trial court erred in 1) instructing the jury on the issue of liability and damages and, 2) concluding that the plaintiff's treating physician was "unavailable" to testify as a live witness at plaintiff's second trial. See GCR 1963, 302.7; MRE 2.302 (B)(4)(d). Our disposition of this appeal makes it unnecessary to address these claims.

Reversed.

/s/ Michael F. Cavanagh
/s/ James H. Brickley
/s/ Patricia J. Boyle
/s/ Dorothy Comstock Riley
/s/ G. Mennen Williams

LEVIN, J. (*concurring*).

Frank J. Szopko was a crew member on a Kinsman Marine Transit Company ship. He was injured when he slipped and fell on the dock while returning from a personal shore leave to the ship. He commenced this action under the Jones Act.[1] As set forth in the opinion of the Court, Szopko can recover for his injuries under the Jones Act only if he can establish both that he was acting "in the course of his employment" when injured, and that his injury was caused by the negligence of Kinsman. The majority holds that Szopko was unable to establish either element, and so it denies his claim.

I concur in the decision of the majority, but disagree on the "course of employment" issue.

A number of courts have held that a seaman on shore leave, at least when he is leaving from or returning to his ship by a standard route from a personal shore leave, is within the course of his employment under the Jones Act.[2] The United States Supreme Court has said

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[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railroad employees shall apply . . . ." 46 USC 688.

[2] See *Nowery* v *Smith*, 69 F Supp 755 (ED Pa, 1946), aff'd 161 F2d 732 (CA 3, 1947); *Walton* v *Continental SS Co*, 66 F Supp 836, 841 (D Md, 1946); *Williamson* v *Western-Pacific Dredging Corp*, 304 F Supp 509 (D Or, 1969), aff'd 441 F2d 65 (CA 9, 1971), cert den 404 US 851 (1971); *Dixon* v *Grace Lines, Inc*, 27 Cal App 3d 278, 286, n 5; 103 Cal Rptr 595 (1972).

Numerous other cases have so stated in dicta. See, e.g., *Wheeler* v *West India SS Co*, 103 F Supp 631 (SD NY, 1951), aff'd 205 F2d 354 (CA 2, 1953), cert den 346 US 889 (1953); *Broussard* v *Marine Transport Lines, Inc*, 369 F Supp 103 (ED Tex, 1974); *Dangovich* v *Isthmian Lines, Inc*, 218 F Supp 235 (SD NY, 1963), aff'd 327 F2d 355 (CA 2, 1964);

(*concluded on page B-21*)

as much in dicta. See *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129, 131-132; 80 S Ct 247; 4 L Ed 2d 191 (1959),

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(*continued from page B-20*)

Ugarte v *United States Lines, Inc*, 64 NY2d 836; 486 NYS2d 934; 476 NE2d 333 (1985); *Allan* v *Brown & Root, Inc*, 491 F Supp 398 (SD Tex, 1980); *Marceau* v *Great Lakes Transit Corp*, 146 F2d 416 (CA 2, 1945). See also Anno: *Jones Act — Course of Employment*, 4 L Ed 2d 1777.

Kinsman relies on *In re Atlass*, 350 F2d 592, 597 (CA 7, 1965), where the United States Court of Appeals for the Seventh Circuit denied the claim of two seamen who drowned while returning to the ship from a personal shore leave because they were not in the course of their employment when the accident occurred. In so holding, however, the court stressed that the two seamen were extremely drunk when they fell into the water and said that they were responsible for their own deaths. The court also implied that the plaintiffs would have been in the course of their employment while returning from shore leave in ordinary circumstances, and that it was the excessive drinking that constituted a departure from their employment. Even *Atlass* is not distinguishable, it is an anomaly among the numerous decisions supporting the rule that a seaman on shore leave, at least when he is leaving the ship or returning to it, is within the course of his employment under the Jones Act.

The majority attempts to distinguish *Central Gulf Steamship Corp* v *Sambula*, 405 F2d 291 (CA 5, 1968), in which the United States Court of Appeals for the Fifth Circuit held that a seaman who was assaulted while on shore leave was within the course of his employment. In so holding, the court cited at length from *Nowery* v *Smith*, n 2 *supra*, for the view that a seaman on shore leave is in the course of his employment.

In attempting to discredit the authority of *Sambula*, the majority relies on a footnote in *Sambula* that might appear to contradict the rule stated in *Nowery:*

> "The preceding language from *Nowery* v *Smith* does not mean that a seaman may recover under the Jones Act for all injuries sustained while he is on shore leave; it means only that recovery cannot be denied solely on the ground that a seaman, while on shore leave, is not 'in the course of his employment.'" *Sambula, supra*, p 298, n 4.

The footnote notes that merely being in the course of one's employment is not sufficient under the Jones Act for the plaintiff to recover. The plaintiff's injury must have been caused by the defendant's negligence. Read this way, what otherwise might be seen as an incongruous footnote becomes understandable. The footnote reminds the reader that under the Jones Act — in contrast with a maintenance and cure action — the plaintiff must establish both that he was in the course of his employment and that the shipowner was negligent.

where the Court said that the meaning of the term "in the course of his employment" under the Jones Act was equivalent to the meaning of the term "in the service of the ship" in a maintenance and cure action.[3] The Court had previously held that a seaman returning to his ship from a personal shore leave is in the service of his ship for purposes of maintenance and cure.[4]

There are also a number of decisions that contradict the majority's construction of the "course of employment" requirement, although they stop short of affirming the above-stated view. Those decisions declare that a seaman may be within the course of his employment under the Jones Act although he is not, at the time he is injured, carrying out his employer's orders, or otherwise performing a job function.[5]

O'Donnell v *Great Lakes Dredge & Dock Co*, 318 US 36; 63 S Ct 488; 87 L Ed 596 (1943), cited in the opinion of the Court, does not hold that a seaman is within the course of his employment under the Jones Act only when he is following orders or performing a job function. The Court held rather that a seaman can be within the course of his employment although he is injured

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[3] The majority too readily dismisses *Braen*, *supra*. While the holding in *Braen* goes no further than to state that since the plaintiff was doing the work of his employer when injured he was clearly in the course of his employment, the Court certainly did not suggest, as the majority implies, that a seaman is *not* in the course of his employment if he is not performing the work of his employer. The actual holding does not address the status of a seaman who is off duty or on shore leave.

[4] *Aguilar* v *Standard Oil Co*, 318 US 724; 63 S Ct 930; 84 L Ed 1107 (1943). *Warren* v *United States*, 340 US 523; 71 S Ct 432; 95 L Ed 503 (1951).

[5] See, e.g., *Holm* v *Cities Service Transportation Co*, 60 F2d 721, 722 (CA 2, 1932); *Sundberg* v *Washington Fish & Oyster Co*, 138 F2d 801 (CA 9, 1943); *McCall* v *Inter-Harbor Navigation Co*, 154 Or 252; 59 P2d 697 (1936).

on land rather than navigable waters. The plaintiff in *O'Donnell* was injured when a weight fell on him while he was working on shore. The United States Court of Appeals for the Seventh Circuit had denied recovery under the Jones Act because the injury did not occur on navigable waters. The United States Supreme Court held that the words "in the course of his employment" are not restricted to injuries that occur at sea. It did not hold that a seaman returning from shore leave was not in the course of his employment.

/s/ Charles L. Levin

ARCHER, J. (*dissenting*).

I respectfully dissent. The Court of Appeals decision in this case should be affirmed.

In *Braen* v *Pfeifer Oil Transportation Co*, 361 US 129; 80 S Ct 247; 4 L Ed 2d 191 (1959), the United States Supreme Court held that "course of employment" under the Jones Act is the equivalent of "in the service of the ship" formula used in maintenance and cure cases. The majority states that the Court of Appeals placed improper emphasis on portions of *Braen*, while ignoring its holding. I disagree.

By holding that course of employment under the Jones Act was the equivalent of the "in the service of the ship" formula, the *Braen* Court left the door open for fact situations like the one presented here. By reason of the unique nature of his employment, a seaman is considered to be on the shipowner's business while he is enjoying shore leave because such leave, with its attendant relaxation, is a necessary and beneficial remedy for the confinement and discipline to which the seaman is subjected while aboard ship. There is no

valid reason why, for purposes of determining the shipowner's liability under the Jones Act, a seaman on leave who slips and falls on the deck while returning to the ship should not be considered to be "in the course of his employment."

Defendant contends that a shipowner has no duty to provide a safe means of ingress and egress beyond the gangplank to a seaman who is off duty and ashore on his own personal time. I agree with the Court of Appeals treatment of this contention. "If a seaman on shore is in the course of his employment for purposes of Jones Act coverage, it seems contradictory to limit the ship owner's liability for its negligence at the end of the gangplank. Such a strict delineation of the employer's duty renders irrelevant the fact that a seaman is in the course of his employment even though off the ship."

/s/ Dennis W. Archer

APPENDIX C

ORDER DENYING REHEARING

(State of Michigan — Supreme Court)

(Certified February 3, 1987)

(FRANK J. SZOPKO, Plaintiff-Appellee, v KINSMAN MARINE TRANSIT COMPANY, Defendant-Appellant — SC: 74646; CoA: 64766; LC: 74-013284 NO; Rehearing No. 180)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 3rd day of February in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable: DOROTHY COMSTOCK RILEY, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DENNIS W. ARCHER, ROBERT P. GRIFFIN, Associate Justices.

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

Griffin, J., not participating.

(Certification Omitted)